Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1119

FILM FOLLIES, INC., an Oregon corporation,

Appellant,

v.

HARL HAAS, individually and as District Attorney for Multnomah County, Oregon; LOUIS RHINEHART, individually and as Director of Public Safety for Multnomah County, Oregon; BRUCE BAKER, individually and as Chief of Police of the City of Portland, Oregon; and LEE JOHNSON, individually and as Attorney General of the State of Oregon,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF OREGON

MOTION TO DISMISS OR AFFIRM

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SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Affirming or Dismissing Appeal	2
Conclusion	9

TABLES OF AUTHORITIES

Cases Cited

Ebert v. Maryland Board of Censors, 19 Md App 300 (1973), *cert den sub nom* Ayre v. Maryland, 419 US 1073 (1974)	8
Hamling v. United States, 418 US 87 (1974)	6, 9
Herman v. State, 256 Ark 840, 512 SW2d 923 (1974) *cert den* 420 US 953 (1975)	7
Jenkins v. Georgia, 418 US 153 (1974)	6
Marshall v. Ohio, 419 US 1062 (1974)	8
Memoirs v. Massachusetts, 383 US 413 (1966)	4, 8
Miller v. California, 413 US 15 (1972)	Passim
Pape v. State, 281 S2d 600 (Dist Ct App Fla 1973)	9
People v. Enskat, 33 CA3d 900, 109 Cal Rptr 433 (1973)	8
People v. Kaplan, — Cal Rptr —, — CA3d —, *cert den,* 419 US 915 (1974)	7
Pierce v. State, 292 Ala 473, 296 S2d 218 (1974), *cert den* 419 US 1130 (1975)	7
Price v. Commonwealth, 214 Va 490, 201 SE 2d 798, *cert den* 419 US 902 (1974)	7

TABLE OF AUTHORITIES, Continued

	Page
Slaten v. Paris Adult Theatre I, 231 Ga 312, 201 SE2d 456 (1973), *reh den* Paris Adult Theatre I v. Slaten, 419 US 887 (1974)	8
State v. Bryant, 285 NC 27, 203 SE2d 27, *cert den*, 419 US 974 (1974)	8
State v. J-R Distributors, Inc., 82 Wash 2d 584, 512 P2d 1049 (1973), *cert den*, 418 US 949 (1974)	8
State v. Shreveport News Agency, 287 S2d 464 (La 1973)	8, 9
State v. Watkins, 262 SC 178, 203 SE2d 429 (1973), *app dis* 413 US 905 (1974)	8
State ex rel Keating v. Vixen, 35 Ohio St 2d 215, 301 NE2d 880 (1973)	8
Stroud v. Indiana, 257 Ind 201, 300 NE2d 100 (1973)	8

Constitutional/Statutory Provisions

US Const, Amend I	2, 3
US Const, Amend XIV	3
ORS 167.060(10)	5, 6
Or Laws 1973, ch 699 §4	2, 5, 7

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ON APPEAL FROM THE COURT OF APPEALS OF OREGON

MOTION TO DISMISS OR AFFIRM

OPINION BELOW

Appellant's statement is accepted.

JURISDICTION

Appellant's statement is accepted.

QUESTION PRESENTED

Whether Oregon's obscenity statute combined with its definitions is too broad and inspecific and so is in violation of the First Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appellant's statement is accepted.

STATEMENT OF THE CASE

Appellant's statement is accepted.

REASONS FOR AFFIRMING OR DISMISSING THE APPEAL

Appellant seeks review of a decision of the Oregon Court of Appeals based upon an alleged error of Constitutional dimensions in the affirmance of a trial judge's denial of a declaratory judgment.

Appellant's request for a declaratory judgment is based on the contention that ORS 167.060(10) and Oregon Laws 1973, ch 699 §4 are overbroad and in violation of the First Amendment.

Virtually identical contentions concerning this statute's alleged unconstitutionality were recently raised by a petition for certiorari which this Court denied. *Liles v. Oregon*, —— US —— (May 3, 1976) (No. 75-983). In view of this fact, appellees respectfully urge that this appeal be dismissed for want of a substantial federal question.

Should this Court deem it appropriate to reach the

merits of this appeal, appellees respectfully urge that dismissal or summary affirmance remains the appropriate disposition.

This Court held in *Roth v. United States*, 354 US 476 (1957) that the states could prohibit obscenity because obscenity is not protected by the First Amendment to the United States Constitution. However, state obscenity statutes have been subject to attack on two grounds: First, because they are overbroad, prohibiting expression which is not obscenity but is still protected by the First Amendment; such overbroad statutes are invalid for prohibiting protected expression. Second, because they are too vague; vague statutes violate an alleged offender's due process rights under the Fourteenth Amendment to the United States Constitution since the offender is unable to ascertain what is unlawful under the statute, and because enforcement officials can be arbitrary in picking behavior for prosecution under such a statute. Vague statutes are also invalid due to the "chilling effect" they have on the exercise of expression protected by the First Amendment.

To meet both defects of overbreadth and vagueness, this Court has established and refined a standard of what is obscene and can be prohibited by the states. In *Roth, supra*, this Court held that obscenity was not protected by the First Amendment because it was utterly without redeeming social value. The test to determine whether material was obscene (which meant both that

it could, as a matter of constitutional law, be prohibited, and that it was, as a question of fact, prohibited by the state statute) was

> ". . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." (Footnote omitted). *Roth v. United States, supra,* 354 US at 489.

After *Roth,* many courts used "utterly without redeeming social value" as a prerequisite for a finding of obscenity and in *Memoirs v. Massachusetts,* 383 US 413 (1966), three members of this Court held the standard of what is obscenity to be that

> ". . . it must be established that (a) the dominant theme of the material taken as a whole appeals to the prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." 383 US at 418.

Many states enacted statutes adopting either the *Roth* or the *Roth-Memoirs* standard.

In *Miller v. California,* 413 US 15 (1972) this Court reassessed its previous decisions and decided that to prove material was "utterly without redeeming social value" placed too great a burden on the prosecution. *Miller, supra,* 413 US at 22. Five justices joined in reaffirming *Roth* and held the standard to be applied by the trier of fact to be

> ". . . (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest [citations omitted]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. . . ." *Miller v. California, supra* 413 US at 24.

"Sexual conduct specifically defined" could be defined by statute or construed by the state courts.

> ". . . we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. n. 6 . . .
>
> "_____
>
> "n. 6 See, *e.g.,* Oregon Laws 1971, c. 743, Art. 29, §§255-262, (which includes ORS 167.060(10)) [citations omitted] as examples of state laws directed at depiction of defined physical conduct, as opposed to expression. Other state formulations could be equally valid in this respect. In giving the Oregon and Hawaii statutes as examples, we do not wish to be understood as approving of them in all other respects nor as establishing their limits as the extent of state power.
>
> *"We do not hold, as MR. JUSTICE BRENNAN intimates, that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate.* [citations omitted]." *Id.* (Emphasis supplied).

Since Oregon Laws 1973, ch 699 §4(2) adopts the *Miller* language for obscenity, there can be no question that the standards to be applied are constitutional. Appellant, therefore, must base its argument of overbreadth on the one aspect of the *Miller* requisites that

this Court did not set out verbatim, *viz,* the definition of sexual conduct which state law must include.

However, this Court *did* cite the Oregon definition with approval as an example of a valid formulation in the context of obscenity regulation per se, not obscenity regulation for minors only. With the implied approval of the statute in *Miller,* there should be no question of the constitutional adequacy of that definition.

Even if appellant did not have the hurdle of this Court's express approval in *Miller,* its argument must fail before this Court's examples of what can be defined for regulation:

> "We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain *examples* of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*:
>
> "(a) Patently offensive representation or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> "(b) Patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals." *Id,* at 25. (Emphasis supplied).

These were intended as mere examples and were not meant to be exhaustive. *Hamling v. United States,* 418 US 87 (1974); *Jenkins v. Georgia,* 418 US 153 (1974). But as examples of "hard core pornography" they are directed at the same type of conduct as defined in ORS 167.060(10):

> "'Sexual conduct' means human masturbation, sexual intercourse, or any touching of the genitals, pubic area or buttocks of the human male or female,

> or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals *in an act of apparent sexual stimulation or gratification.*" (Emphasis supplied).

To be criminal, a depiction of such conduct must be "patently offensive" under Oregon Laws 1973, ch 699, §4(2). Any touching of the buttocks or female breasts must be "in an act of apparent sexual stimulation or gratification," and as such would be a "sexual act." Therefore, under Oregon's statutory scheme, touching the buttocks or female breasts must be depicted as a patently offensive sexual act. The depiction of conduct that appellant contends cannot be constitutionally regulated falls within the examples of hard core pornography given by this Court in *Miller* as examples of what *can* be regulated. The Oregon Court of Appeals so construed it.

Oregon's definition of "sexual conduct" is limited to "hard core pornography" and is valid under *Miller.* Indeed, even the course of many states with statutes embodying the older *Roth* or *Roth-Memoirs* test has been for the state's supreme court to construe their statute to be limited by *Miller* and uphold the convictions thereunder. *See Pierce v. State,* 292 Ala 473, 296 S2d 218 (1974), *cert den* 419 US 1130 (1975); *Herman v. State,* 256 Ark 840, 512 SW2d 923 (1974), *cert den* 420 US 953 (1975); *Price v. Commonwealth,* 214 Va 490, 201 SE2d 798, *cert den* 419 US 902 (1974); *People v. Kaplan,* —

Cal Rptr ——, — CA3d ——, *cert den,* 419 US 915 (1974); *Slaten v. Paris Adult Theatre I,* 231 Ga 312, 201 SE2d 456 (1973), *reh den Paris Adult Theatre I v. Slaten,* 419 US 887 (1974); *see also People v. Enskat,* 33 CA3d 900, 109 Cal Rptr 433 (1973); *State ex rel Keating v. Vixen,* 35 Ohio St 2d 215, 301 NE2d 880 (1973); *Marshall v. Ohio,* 419 US 1062 (1974); *State v. Watkins,* 262 SC 178, 203 SE2d 429 (1973), *app dis* 413 US 905 (1974); *State v. Bryant,* 285 NC 27, 203 SE2d 27 *cert den,* 419 US 974 (1974).

At least two states, Maryland and Washington, have upheld, under *Miller*, statutes that had no definition of obscenity at all: *Ebert v. Maryland Board of Censors,* 19 Md App 300 (1973), *cert den sub nom Ayre v. Maryland,* 419 US 1073 (1974); *State v. J-R Distributors, Inc.,* 82 Wash 2d 584, 512 P2d 1049 (1973), *cert den* 418 US 949 (1974).

Three state supreme courts have invalidated their state obscenity statutes under *Miller*. In *Stroud v. Indiana,* 257 Ind 201, 300 NE2d 100 (1973), the Indiana Supreme Court gave no discussion of their reason, and appears to have been under the impression that this Court had held their statute unconstitutional when it vacated and remanded for consideration in light of *Miller*. In *State v. Shreveport News Agency,* 287 S2d 464 (La 1973), the court held a *Roth*-type statute invalid under *Miller* and held it lacked the power to construe the statute to conform to *Miller*. Their reading of *Miller*

was shown to be incorrect by *Hamling, supra,* decided after *Shreveport News Agency*. Likewise, in Florida, their supreme court refused to construe a *Roth*-type statute to adopt the *Miller* standards on the grounds that it would violate due process to do so after the conviction. *Pape v. State,* 281 S2d 600 (Dist Ct App Fla 1973). That case also was decided before *Hamling* and its position rejected by this Court in that case and in the state supreme courts listed above.

In sum, Oregon's statutory scheme, as written by the Oregon legislature, complies with the *Miller* standard and is limited to "hard core pornography."

CONCLUSION

For the above reasons, this appeal should be dismissed for want of a substantial federal question, or the judgment of the Oregon Court of Appeals should be summarily affirmed.

Respectfully submitted,
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May, 1976